fact his health continued to deteriorate till his death. I therefore find that when the deceased knew he had cancer, he was under apprehension of imminent death and that nothing had happened to him that would interrupt such apprehension from his mind until he died.

I also find that the deceased had transferred 298 of his 300 shares in Kelantan Match Factory Limited to the defendants to prevent the three plaintiffs who are his heirs, from making any claim to those shares upon his death. It is also a fact that the plaintiffs had never given their consent to the deceased to transfer those shares to the four defendants.

I would, therefore, find that the transfers of the 298 shares in the Kelantan Match Factory by the deceased to the four defendants are void under the doctrine of mard-al-maut. I give judgment for the plaintiffs in these two civil suits, and order that:

a) the transfers of the 298 shares in Kelantan Match Factory by the deceased to the defendants No. 2, No. 3 and No. 4 in Civil Suit No. 131 of 1976, and the defendant in Civil Suit No. 20 of 1979 made by him on October 9, 1966 and October 11, 1966 be set aside;

b) the estate of the deceased do return the purchase money for the said shares to the four defendants mentioned in (a) above;

c) the four defendants mentioned in (a) do re-transfer the shares they had purchased from the deceased to the estate;

d) the four defendants mentioned in (a) do take and make full accounts in respect of the shares, dividends paid and other benefits received by them and that they forthwith pay the same to the estate of the deceased.

As had been agreed by the parties, the question of costs shall be submitted by them upon delivery of the decision in these two suits. I reserve the question of costs until I have heard the counsels' submissions on this.

Order accordingly.

Solicitors: *Zain & Co.; C. H. Liew & Co.; Wrigglesworth & Co.*

K. SHANTA KUMARI v. VIJAYAN

[O.C.J. (Wan Yahya J.) November 19, 1985]

[Malacca – Originating Summons No. 145 of 1985]

Family Law – Custody of infant – Welfare of infant – Conduct of the parties – Guardianship of Infants Act 1961, s. 11.

In this case the applicant applied to regain the custody of her 20 month old infant from her father. Except for a brief period when she was taken away by the father the infant had been in the loving care of her mother, the applicant. The father had neglected the child since her birth but had taken the child away when he visited her without the mother's knowledge or consent.

Held: (1) in deciding the question of custody under Section 11 of the Guardianship of Infants Act 1961, it is imperative for the court to note that no parent enjoys an earlier or superior right over the child and that the welfare of the infant should be the paramount consideration. The care, comfort and attention as well as the wellbeing and happiness of the child are relevant matters to be considered. The Court may also look to the conduct of the parties and decide which of the two houses can offer the child the better security and stability;

(2) even going on the assumption that both parents are equally capable of providing the care, comfort and attention to the infant, the courts have always leaned in favour of the mother being given custody of young infants;

(3) in this case it is in the interest and welfare of the infant that she should continue to remain in the custody of the mother.

Cases referred to:

(1) *Kades* v. *Kades* (1961) 35 A.L.J.R. 251.
(2) *Re Orr* [1973] 2 D.L.R. 77.
(3) *Myriam* v. *Mohamed Ariff* [1971] 1 M.L.J. 265.
(4) *Koh Teng Lam* v. *Elsie Koh Chen Chee & Anor.* [1976] 1 M.L.J. 103, 177.
(5) *Loh Kon Fah* v. *Lee Moy Lan* [1976] 2 M.L.J. 199.

ORIGINATING SUMMONS.

D.A. Devadason for the applicant.
Foo Nyong Tiam for the respondent.

Cur. Adv. Vult.

Wan Yahya J.: This is an application by a mother to regain custody of her 20-month old infant from her father. Shanta Kumari, the applicant herein, was married to the respondent, Vijayan, on September 1, 1982. She was 23 years old and was an employee of the Kua Denko, Melaka. He was a year younger and unemployed. The union came about through an arranged marriage.

After the marriage, the couple lived with the husband's parents until early 1984. On January 1, 1984 when she was 7 months pregnant, applicant left her parents in-law house to return to her own parent's house. According to her, during the period of her pregnancy, her in-laws were not only unconcerned about her health but were also totally unkind to her. Applicant's mother, on the other hand, took a more restrained view in the witness stand by saying that she took her daughter back to care for her during the difficult phase of pregnancy and this, according to her, is the normal practice amongst the Malayalam people. Anyway, a family friend of both families who accompanied applicant's mother to the respondent's house, testified that the incident was a stormy one during which the respondent's mother hurled abusive words (which she declined to repeat) on applicant's mother. The respondent's mother then made the applicant remove her 'tali' before leaving from house – a gesture which I have come to understand as denouncing the marriage between the couple according to Hindu custom.

I have no reason to disbelieve this account.

The applicant returned to live in her mother's house and on March 5, 1984 the infant, Preveena, was born. The applicant continued working with the same company to support herself and her infant daughter. Throughout this period and indeed even after the delivery of the child in the General Hospital, Malacca, the respondent neither visited the infant nor supported her. It was the applicant who had to bear the cost of delivery and maintenance of the child.

When the infant was one year and 3 months old, *i.e.*, some time in June 1985, the respondent began to call at the applicant's mother's house where he was well received. For a brief moment, there was hope of reconciliation but one day when the applicant was at work, respondent came in and took away the child without her mother-in-law's knowledge or consent. Subsequent attempts to get the infant back even with police intervention were unsuccessful. Hence, this application to this Court.

The respondent, who adduced no oral evidence but relied only on his affidavit, alleged that the separation was brought about by a misunderstanding. He accused his wife of wishing to be independent and of her inclination to associate freely with friends and to return home late at nights. He even went to the extent of denying her the credit of paying for the hospital bills which he averred were paid by her employer. He finally stated that he took the infant with applicant's consent and that this application was made purely on the instigation of her parents. Finally, he claimed that the applicant who is now working cannot take care of her daughter.

I find it is difficult to understand, let alone believe, these accusations. If she is a woman as he painted her to be, why did his counsel say even at the very inception of these proceedings that the character of the spouses are unimpeachable. As for the hospital bill the applicant has clearly denied the allegation to this in her affidavit in reply and her subsequent evidence in Court. Thereafter, the matter remained unchallenged. Assuming for a moment, even if the applicant company had paid for the delivery, what difference would that make to the conduct of the applicant or her right to care for her child? Likewise, I can find no truth in the allegation that he had obtained her previous consent to remove the infant. If that was the case, there was no need for him to come at the time when the applicant was at work and sneak out with the infant while the mother-in-law was not looking. Similarly, she did not have to risk her own safety by going over to look for her child in respondent's house and to lodge a police report. Her conduct subsequent to the disposition of the infant could not by any stretch of imagination be taken as consistent with a mother who had willingly parted with her infant child. At any rate, she had denied this allegation both in her affidavit and in her evidence in Court and in both instances her assertions remained unchallenged. On the allegation that the application was less suited for providing the care required by the infant, I do not quite comprehend how the respondent could prove that he was able to provide better care since he is now working just like his wife and even if he were to remain at home to look after the infant, I do not think he could prove himself to be a better housemaid than the mother.

As his last attempt to justify his action respondent made an offer for her to return to him but when the applicant with the best intention of saving the marriage suggested that they rent a small accommodation separately away from both parents, respondent came back with an unreasonable request that she gave up her job. Probably he had forgotten that in the earlier and happier days of their married life, it was the wife's earning that had sustained them both. The sinister plan behind this offer is too obvious. Once the applicant is deprived of her income she would be entirely at his

mercy. No man in his right senses would give away one half of his entire income especially so when his own pay was only $300.00 per month.

In deciding the question of custody under section 11 of the Guardianship of Infants Act, 1961, it is imperative for this Court to note that no parent enjoys an earlier or superior right over the child and that the welfare of the infant should be the paramount consideration. The care, comfort and attention as well as the well-being and happiness of the child are relevant matters to be considered. The Court may also look into the conduct of the parties and decide which of the two houses can offer the child better security and stability.

In our present case the infant is only 20 months old. Except for a brief period when she was taken away she had been in the loving care of her mother. The applicant had maintained her child in a comfortable manner and had given the infant all the attention the child required. There is no doubt in my mind that there exists very strong love and affection between mother and child. In spite of having been separated for over three months, the child readily ran into the arms of her mother when she first saw her in my Chambers and she sat restfully in her mother's lap throughout the proceedings. The infant has been looked after for 17 months by her natural mother. There is nothing to suggest that the child had been neglected or not properly cared for. Instead, it was the father who was shown to have neglected the child since her birth. In my opinion, the child will be better cared for and attended to by her natural mother and maternal grandparents instead of the infant's father and her paternal grandparents who are strangers to her. Moreover, there is nothing to suggest that she will be looked after by her paternal grandparents as neither had indicated their willingness to do this.

Even going on the assumption that both parents are equally capable of providing the care, comfort and attention to the infant, the Courts have always leaned in favour of the mother being given custody of young infants. The reason is very obvious. An infant of tender age is by nature more physically and spiritually dependant on its own mother than anyone else. In *Kades* v. *Kades*[1] the High Court in a joint judgment stated:

"What is left is the strong presumption which is not one of law but is founded on experience and upon the nature of ordinary human relationships, that a young girl, should have the love, care and attention of the child's mother and that her upbringing should be the responsibility of her mother, if it is not possible to have the responsibility of both parents living together."

In *Re Orr*[2] Muloch C.J. commented:

"In the case of a father and mother living apart and each claiming the custody of a child, the general rule is that the mother, other things being equal, is entitled to the custody and care of a child during what is called the period of nurture, namely, until it attains about seven years of age, the time during which it needs the care of the mother more than that of the father ..."

Similarly in *Myriam* v. *Mohd. Ariff*[3] Abdul Hamid J. (as he then was) when considering the custody of a 3-year old infant said:

"To my mind, it would not be in the interests and welfare of this infant that he should be denied of the natural mother's love, care and affection. It is proper that he should be in the custody of the applicant until at least he reaches the age of 7 or 8 years at which time either party may be at liberty to apply."

In this case the mother of the infant appears to be the main provider for the infant. She had been employed for the past 9 years and is at present drawing a more comfortable salary than the respondent. She has put in twice as much of his period of service and she enjoys a more secure and stable occupation. The child is being brought up in this surrounding of a secure and stable household.

Mr. Foo, counsel for the respondent, impressed upon this Court that every effort should be made to bring about reconciliation between the couple and towards this end he requested that custody of child be given to the father. He cited several authorities. It is in evidence and indeed undisputed evidence that the father was encouraged to visit the child and stay with the applicant's family. The visits were going on amicably with the approval and indeed the encouragement of the applicant's mother. There was nothing to suggest that he was not welcomed in that household. In fact he had such a freedom of access that he was able to see the infant even when the mother was at work, but instead of working on this chance to improve their relationship, he abused the trust and goodwill by taking the child away from her.

Having regard to what the parties said about their feelings towards each other I think the possibility of reconciliation is not too remote. The parties are separated but not divorced and there is a better chance of their mending their feelings if the respondent will consider doing what he had been doing before i.e. to continue visiting his child

at his wife's parent's house. Similar views have already been expressed by Choor Singh J. in the case of *Koh Teng Lam* v. *Elsie Koh Chen Chee & Anor.*[4] where His Lordship said:

"There is one other very important consideration in this case. It is the possibility of the petitioner and the respondent becoming reconciled. The granting of the custody to the respondent in this case will keep alive some hope, even though slight, of a reconciliation. The petitioner may in time realise that he has been listening to false and malicious rumours. If custody is granted to the petitioner, there will be, in my opinion, no hope at all of a reconciliation. The possibility of a reconciliation is clearly an important matter which I must take into consideration in deciding the question of custody."

Again in *Loh Kon Fah* v. *Lee Moy Lan*[5] the Federal Court endorsed the following views of Hashim Yeop Sani J. (as he then was):

"In my judgment the learned judge was quite right in taking the view that so long as the marriage subsisted between the parties and there were no obstacles in the way of the appellant visiting his children at any time, the mother should have the custody. There was evidence that the eldest child, a girl, was doing remarkably well at school in Singapore and so were the other two children. The learned judge must have had in mind the emotional upset if the children were torn away from the mother. Speaking for myself, it was impossible for me to say that the learned judge had either given weight to irrelevant or unproved matters or omitted to take into account matters that were relevant. Nor was I in a position to say that the decision of the learned judge was improper, unjust or wrong."

There is no obstacle or impediment whatsoever to stop the respondent from visiting his child at the applicant's house as he had done before this unfortunate incident. I am pleased to note from the wife's and her own mother's evidence that they would welcome the respondent to their house for either purpose – to see the child or to effect reconciliation.

In conclusion, I would reiterate what I have said earlier that it is in the interest and welfare of the infant that she should continue to remain in the custody of her mother.

Accordingly this application is allowed.

Application allowed.

Solicitors: *D.A. Devadason; Foo Nyong Tiam & Associates.*

THE CHARTERED BANK v. RASHID BIN MOHAMED

[O.C.J. (Gunn Chit Tuan, J.) June 25, July 24 & December 10, 1985]

[Kuala Lumpur – Civil Suit No. C2766 of 1983]

Debtor and Creditor – Debt – Assignment – Notice – Civil Law Act, 1956, s. 4(3).

Banking – Debtor and creditor – Assignment of debt to bank – Demand for payment.

In this case the defendant was granted an interest-free loan for the sum of $120,000 by D.Y.M.M. Yang Di-Pertuan Besar Tuanku Ja'afar ibni Al Marhum Tuanku Abdul Rahman (His Royal Highness). By an assignment in writing dated July 15, 1983, His Royal Highness assigned to the plaintiff absolutely the full benefit and advantage of the debt. On September 20, 1983, the plaintiff gave express notice in writing to the defendant of the said assignment and requested that he pay the plaintiff the said sum of $120,000. Despite repeated requests the defendant failed/refused to pay the plaintiff the said sum or any part thereof. The plaintiff then applied to the Senior Assistant Registrar for final judgment against the defendant in the sum of $120,000 together with interest and costs. The application was refused. On appeal,

Held: (1) the defendant was indebted to His Royal Highness in the sum of $120,000 and there was an assignment in writing of the debt in this case under the hand of the assignor;

(2) the assignment was absolute and did not purport to be by way of charge only. Express notice in writing of the said assignment was also given to the debtor, that is, the defendant in this case from whom the said assignor would have been entitled to claim the debt or thing in action;

(3) the provisions of section 4(3) of the Civil Law Act, 1956, have been complied with and there was no defence to the plaintiff's claim. The plaintiff is granted leave to sign final judgment against the defendant for the sum of $120,000 with interest at the rate of 8% per annum from October 15, 1983 to the date of payment and costs.

Cases referred to:

(1) *In re National Motor Mail-Coach Co. Ltd.* [1908] 2 Ch.D. 515.
(2) *Re Westerton, Public Trustee* v. *Gray* [1919] 2 Ch.D. 104.
(3) *European Asian Bank* v. *Punjab and Sind Bank* [1983] 2 All E.R. 508, 516.
(4) *Nouvau Mont Dor (M) Sdn. Bhd.* v. *Faber Development Sdn. Bhd.* [1984] 2 M.L.J. 268, 269.

CIVIL SUIT.

D. P. Naban for the appellant.
Edmund Ponniah for the respondent.

Cur. Adv. Vult.